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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

CAROLYN WEAVER,
PETITIONER,

V.

UNITED STATES INFORMATION AGENCY, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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24pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 4

I. The First Amendment rights of Weaver, present and future VOA employees and their potential audiences outweigh the government's interest in organizational efficiency. 4

A. The government has no legitimate interest in censoring unclassified material. 6

B. The review policy does not address the government's stated interest in preserving VOA's reputation as an objective news source. 7

II. Employee disclosure is a crucial component of statutorily-mandated public scrutiny of VOA. 8

III. Public employees have much to contribute to the discussion about the efficient operation of government. 9

A. The enactment of whistleblower protection laws demonstrates a national commitment to protecting the rights of government employees to speak out about abuses. 11

B. Government employees who are writers and journalists are uniquely positioned to make significant contributions to the public debate about the functioning of government. 12

IV. Government journalists are protected by the First Amendment and may not be censored. 13

CONCLUSION 16

TABLE OF AUTHORITIES

Arnett v. Kennedy, 416 U.S. 134 (1974) 11

Board of County Commissioners, Wabaunsee County, Kansas v. Umbehr, 116 S.Ct. 2342 (1996) 9

Butterworth v. Smith, 494 U.S. 624 (1990) 11

Connick v. Myers, 461 U.S. 138 (1983) 4, 12

Eberhardt v. O'Malley, 17 F.3d 1023 (7th Cir. 1994) . . 11, 13

Edenfield v. Fane, 507 U.S. 761 (1993) 7

Gartner v. USIA, 726 F. Supp. 1183 (S.D. Iowa 1989) 9

Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991) 10

Goodman v. City of Kansas City, Mo., 906 F. Supp. 537 (W.D. Mo. 1995) 4, 10

Harman v. City of New York, 945 F. Supp. 750 (S.D.N.Y. 1996) 9

Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222 (7th Cir. 1993) 13

Keyishian v. Board of Regents 385 U.S. 589 (1967) 4

Pickering v. Board of Education, 391 U.S. 563 (1968) . . 4, 10, 12

Sanjour v. EPA, 56 F.3d 85 (D.C. Cir. 1995) (*en banc*) . . 5, 9, 10

United States v. Marchetti, 466 F.2d 1309 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972) 6

United States v. National Treasury Employees Union, 513 U.S. 454 (1995) 4, 5, 13, 16

Waters v. Churchill, 511 U.S. 661 (1994) 9, 12

Weaver v. USIA, 87 F.3d 1429 (D.C. Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3539 (U.S. January 29, 1997) (96-1203) 6

Statutes, Regulations and Policies

3 Foreign Affairs Manual § 628.2(c) 7

22 CFR § 247.6(b)(1)(i)(C) 14

22 CFR § 504.2(e)(1)(i)(A)-(C) 16

22 U.S.C. § 1461 8

22 U.S.C. § 1463 16

32 CFR § 247.4 *et seq.* 14

S.Rep. No. 647, 89th Cong., 1st Sess. 2 (1965) 9

VOA Directive 1731A 7

Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (1989) (codified at 5 U.S.C. § 1201 note, 1205, 1211-22 (1994)) 11

Articles and Reports

Congress Plans Inquiry on the Military Press, N.Y. Times, Dec. 13, 1987, at A32 13

Developments in the Law - Public Employment, 97 Harv.L.Rev.

1611 (1984) 9

Bruce D. Fong, *Whistleblower Protection and the Office of Special Counsel: The Development of Reprisal Law in the 1980s*, 40 Am. U. L. Rev. 1015 (1991) 11

Barbara Gamarekin, *Voice of America Has Some Wondrous Plans*, N.Y. Times, Oct. 7, 1988, at A18 17

GAO Report to the Congress, Stars and Stripes, Inherent Conflicts Lead to Allegations of Military Censorship, December 1988, GAO/NSIAD-89-60 14

Jason P. Isralowitz, *The Reporter as Citizen: Newspaper Ethics and Constitutional Values*, 141 U. Pa. L. Rev. 221 (1991) . 12

Bruce G. Knecht, *The Pen is Mightier: U.S. Troops in Bosnia Swear By a Newspaper that Generals Swear at*, Wall Street J., Dec. 23, 1996, at A1 15

Carolyn Weaver, "*When the Voice of America ignores its charter - An insider reports on a pattern of abuses*," Columbia Journalism Review, November/December 1988 at 18 10

INTEREST OF *AMICUS CURIAE*

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of working reporters and editors, dedicated to defending the First Amendment and freedom of information interests of the news media and the public. The Reporters Committee has provided representation, legal guidance and research in virtually every major press freedoms case that has been litigated in the United States since 1970.

This brief is submitted on written consent of the parties.

STATEMENT OF THE CASE

The Reporters Committee adopts the Petitioner's Statement of the Case.

SUMMARY OF THE ARGUMENT

The prepublication review policy ("review policy") at issue here, which applies to all employees of the United States Information Agency ("USIA"), including Voice of America ("VOA"), requires federal employees to submit their non-official speaking, writing and teaching materials for approval by the agency prior to publication. VOA reviews its employees' work for text that is "inaccurate," "confidential," or "inconsistent" with either the agency's operation or with United States foreign policy. One of the government's stated justifications for the review policy is the preservation of VOA's reputation as an objective news source.

Although the government may impose restraints on the job-related speech of public employees that would plainly be unconstitutional in other contexts, such restraints are invalid

when the interests of present and future employees and potential audiences, in disclosing and receiving a broad range of expression upon matters of public concern, outweigh the interest of the government, as an employer, in promoting the efficiency of the services it performs through its employees.

In the instant case, the circuit court erred in finding that the government's speculation of harm justifies the review policy. Specifically with respect to the government's interest in preserving VOA's reputation as a reliable source of objective news, that interest is not served by suppressing employee criticism. In fact, the American public and the international listening community are more likely to perceive VOA as an unbiased news provider if allegations such as Weaver's are publicly aired, institutionally addressed and responded to.

The review policy is contrary to the legislative history of USIA's enabling statute, which provides for public scrutiny of the agency and the content of its newscasts. Because VOA's broadcasts are not disseminated in this country, disclosures such as Weaver's are crucial to keeping the public informed about the agency.

Employees like Weaver can offer the public unique insights into the functioning of government agencies. In enacting whistleblower protection statutes, Congress has recognized the value of such disclosures and the need to protect outspoken workers.

Journalists who are government employees are uniquely positioned to comment about government operations. Because they are trained observers and interpreters of often complex information, journalists are arguably among the most informed and articulate voices of the citizenry. Courts have recognized the historical contributions to the marketplace of ideas by writers who are also government employees.

Our national commitment to free speech extends to government-controlled newspapers such as *Stars and Stripes*, a Department of Defense ("DoD") publication where allegations of censorship in the late 1980's resulted in an overhaul of the newspaper's practices to counter improper news management by military officials. Like VOA, *Stars and Stripes* operates under a mandate to report news in a balanced and objective way. It is ironic that VOA, an agency devoted to the dissemination of accurate news and information around the world, would adopt a review policy that is antithetical to this country's allegiance to a free press and an open exchange of ideas, particularly about governmental operations.

ARGUMENT

I. The First Amendment rights of Weaver, present and future VOA employees and their potential audiences outweigh the government's interest in organizational efficiency.

Although the government may regulate the speech of its employees more stringently than that of the general public, *Pickering v. Board of Education*, 391 U.S. 563 (1968), individuals do not forfeit the free speech rights they enjoy as citizens upon accepting public employment. *Keyishian v. Board of Regents*, 385 U.S. 589, 605-06 (1967); *Goodman v. City of Kansas City, Mo.*, 906 F. Supp. 537, 539, 542-44 (W.D. Mo. 1995) (individuals do not automatically relinquish their First Amendment rights by accepting government employment). The duty of the courts is to balance "the full protection of speech upon issues of public concern" and the "practical realities involved in the administration of a government office." *Connick v. Myers*, 461 U.S. 138, 154 (1983). In evaluating the validity of a *post hoc* restraint on public employee speech, this Court has weighed the interests of the employee, as a citizen, in commenting upon matters of public concern and the interest of the government, as an employer, in promoting the efficiency of the public services it performs through its employees. *Pickering*, 391 U.S. at 568.

In *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995) ("*NTEU*"), this Court modified the *Pickering* test to evaluate the constitutionality under the First Amendment of government restrictions on prospective employee speech. *NTEU* involved a challenge to a statutory provision prohibiting all employees from receiving honoraria for their unofficial and nonpolitical writing and speaking activities. The government contended that the ban was necessary to ensure that federal officers did not misuse or appear to misuse their power by accepting compensation, and to optimize efficiency. In

negating the honoraria ban, this Court articulated the following test:

> The government must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's "necessary impact on the actual operation" of the Government.

Id., 513 U.S. at 461 (imposing a higher standard of review because the statute was a "wholesale deterrent to a broad category of expression by a massive number of potential speakers"). This Court found no evidence of misconduct related to honoraria in the rank and file of low-grade federal employees, and recognized the inherent value of free and open dialogue between the employees and the public.

Thereafter, the D.C. Circuit applied the *NTEU* test to strike down an honoraria ban relating to the off-duty speech of Environmental Protection Agency employees on subjects directly related to their employment. *Sanjour v. EPA*, 56 F.3d 85 (D.C. Cir. 1995) (*en banc*). The court held that any appearance of impropriety would be the same regardless of the agency's approval or disapproval of the speech. *Id.* at 104.

The record in the instant case fails to reflect that employee criticism of the agency "necessar[ily] impact[s]" on its actual operation. As noted by the circuit court dissent:

> [T]he government has offered us no more than a few vague statements about speculative damage to the foreign relations of the United States to justify a formidable restriction on its employees' speech. With the possible exception of review for the inadvertent disclosure of classified information, the VOA has failed to meet its

> burden of showing harms that "are real, not merely conjectural," because the alleged harms do not implicate the interests of the VOA as an employer in carrying out its operational mission.

Weaver v. USIA, 87 F.3d 1429, 1444 (D.C. Cir. 1996) ("the mere invocation of 'foreign relations' has no talismanic significance in First Amendment jurisprudence"), *petition for cert. filed*, 65 U.S.L.W. 3539 (U.S. January 29, 1997) (96-1203).

A. The government has no legitimate interest in censoring unclassified material.

Even in speech restriction cases involving employees with access to national security or other sensitive information, courts have expressly stated that the government has no legitimate interest in censoring unclassified material. In *United States v. Marchetti*, 466 F.2d 1309 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972), the CIA sought to enjoin a former employee who had signed a confidentiality agreement promising that after his departure from the agency he would not divulge classified information to which he had access while a CIA employee. The employee contended such a restraint violated his First Amendment rights. While upholding the agreement, the Court distinguished between the rights at stake:

> Thus Marchetti retains the right *to speak and write about the CIA and its operations*, and *to criticize it* as any other citizen may, but he may not disclose classified information obtained by him during the course of his employment which is not already in the public domain.

Id., 466 F.2d at 1317 (emphasis added).

Under this standard, even if Weaver had access to

classified information, she would have a First Amendment right to publish an article containing nonclassified information that was critical of the agency.

B. The review policy does not address the government's stated interest in preserving VOA's reputation as an objective news source.

When the government seeks to sustain a restriction on speech, it must demonstrate that the harms it recites are real and that the restriction will in fact alleviate them to a material degree. *Edenfield v. Fane*, 507 U.S. 761 (1993). VOA requires prior review of its employees' work for text that is "inaccurate," "confidential," or "inconsistent" with either the agency's operation or with United States foreign policy. 3 Foreign Affairs Manual ("FAM") § 628.2(c). An internal memorandum dated November 24, 1986 provides the following justification for the review policy:

> [V]OA employees have a special obligation to avoid conflicts and apparent conflicts of interest which might adversely affect VOA's ability to fulfill its mission in accordance with its charter. Employees must be particularly mindful of such conflicts when engaging in outside activities such as outside employment, writing or participation in a leadership role in private organizations dealing with international relations which might call into question VOA's reliability as a source of objective news.

VOA Directive 1731A at 3c (employees must limit participation in activities that would impair VOA's "ability to function as a reliable source of news and information").

The review policy does not advance the government's interest in promoting the agency's reputation as an objective

news source. Censoring criticism by VOA employees does not enhance the agency's reputation for objectivity. In fact, the knowledge that allegations of politicization within the agency will be revealed and addressed can only enhance the confidence of both the American public and the international listening audience that the agency is adhering to its charter.

II. Employee disclosure is a crucial component of statutorily-mandated public scrutiny of VOA.

Congress expressly provided for public oversight of VOA. Section 501 of the United States Information and Educational Exchange Act of 1948, as amended, provides, in pertinent part:

> The director [of USIA] is authorized . . . to provide for the preparation, dissemination and dissemination abroad, of information about the United States, its people, and its policies, through press, publication, radio, motion pictures, and other information media, and through information centers and instructors abroad. Any such information . . . shall not be disseminated within the United States, its territories, or possessions, but, on request, shall be available in the English language at the agency, at all reasonable times following its release as information abroad, for examination only by representatives of the United States press associations, newspapers, magazines, radio systems, and stations, and by research scholars, and, on request, shall be made available for examination only to members of Congress.

22 U.S.C. § 1461 (1992).

Congress limited USIA's activities to the "foreign

sphere" in order to prevent the agency from propagandizing the American public. *Gartner v. USIA*, 726 F. Supp. 1183, 1186 (S.D. Iowa 1989). However, Congress clearly intended to provide for independent domestic oversight of USIA activities. As part of achieving that goal, the statute provides that the press, among others, may have access to USIA information. According to a Senate report, transcripts of the agency's broadcasts should be available for inspection "in order to assure that the output of USIA would be subject at all times to scrutiny by responsible people outside the agency." S.Rep. No. 647, 89th Cong., 1st Sess. 2 (1965).

The review policy is contrary to the spirit of § 501, which reflects Congress' intent that VOA operate openly, under public scrutiny. Because VOA's broadcasts are not available in this country, citizens cannot monitor the broadcasts themselves. Although the statute provides for review of USIA material by journalists, scholars and legislators, revelations by agency employees can play an essential role in keeping the public informed about VOA policies and the contents of its newscasts.

III. Public employees have much to contribute to the discussion about the efficient operation of government.

Government employees are often in the best position to comment on the strengths and weaknesses of the agencies for which they work. *Board of County Commissioners, Wabaunsee County, Kansas v. Umbehr*, 116 S.Ct. 2342 (1996); *Waters v. Churchill*, 511 U.S. 661 (1994). Staff members such as Weaver are uniquely positioned to offer insights into the workings of the agency generally, and their areas of specialization in particular. *Sanjour v. EPA*, 56 F.3d 85, 94 (D.C. Cir. 1995) (*en banc*); *Harman v. City of New York*, 945 F. Supp. 750 (S.D.N.Y. 1996); *Developments in the Law - Public Employment*, 97 Harv.L.Rev. 1611, 1768 (1984) ("public employees, by virtue of their expertise and experience, are often among the citizens

who are best informed . . . and [] their opinions are thus especially valuable to the public").

Public employees addressing "current government policies [is] perhaps the paradigmatic 'matter[] of public concern.'" *Sanjour*, 56 F.3d at 94. Therefore, public debate may be significantly enhanced by their informed opinions. *Pickering*, 391 U.S. at 572.

In *Pickering*, a teacher was terminated for writing a letter to the editor that was critical of the school budget. The Supreme Court emphasized that "[t]eachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal." *Id.* at 572. In *Goodman*, the court noted that school district personnel may be in a unique position to provide the public with information and informed opinions on matters affecting educational quality with respect to school board elections. 906 F. Supp. at 542.

Analogously, employees like Weaver have much to contribute to the public debate about VOA. Weaver's article, "*When the Voice of America ignores its charter - An insider reports on a pattern of abuses*," Columbia Journalism Review, November/December 1988 issue at 18, raised allegations of undue politicization within the agency. Only an employee with access to the inner workings of the agency could have written such an article.

Outside of the public employee context, this court has recognized that speech critical of the exercise of the State's power lies at the very center of the First Amendment. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1034 (1991) (describing as "classic political speech" entitled to First Amendment protection an attorney's statements criticizing the indictment of

his client by the State); *Butterworth v. Smith*, 494 U.S. 624, 632 (1990) (information relating to alleged governmental misconduct is speech which has traditionally been recognized as lying at the core of the First Amendment).

A. The enactment of whistleblower protection laws demonstrates a national commitment to protecting the rights of government employees to speak out about abuses.

Congress has provided additional protections to government employees who speak out about abuses within their agencies by enacting whistleblower protection statutes. The legislative history of the Whistleblower Protection Act of 1989 recognizes that "[f]ederal employees who make disclosures ... serve the public interest by assisting in the elimination of fraud, waste, abuse and unnecessary public expenditures" and that "protecting employees who disclose Government illegality, waste, and corruption is a major step toward a more effective civil service." Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (1989) (codified at 5 U.S.C. § 1201 note, 1205, 1211-22 (1994)).

The fact that Congress enacted the Whistleblower Protection Act demonstrates its commitment to free and open discussion about the efficient and orderly operation of government and to protecting outspoken workers from retaliation for making such disclosures. *Arnett v. Kennedy*, 416 U.S. 134, 228 (1974) (Marshall, J., dissenting) (describing "[the] importance of Government employees' being assured of their right to freely comment on the conduct of Government, to inform the public of abuses of power and of the misconduct of their superiors . . ."); *Eberhardt v. O'Malley*, 17 F.3d 1023, 1027 (7th Cir. 1994) (noting that courts "have had to separate the not very socially valuable forms of speech from whistleblowing and other socially valuable expressive activities of public employees"); Bruce D. Fong, *Whistleblower Protection*

and the Office of Special Counsel: The Development of Reprisal Law in the 1980s, 40 Am. U. L. Rev. 1015 (1991).

In light of Congress' decree that the speech of whistleblowers is valuable and merits protection, it is irrational to let stand prepublication review policies such as the one at issue, where there is no clear threat to the orderly operation of government. The better policy is to encourage open discussion about government by those in the best position to analyze it. *Waters*, 511 U.S. at 698 ("[o]ne could make a respectable argument that high officials should allow more public dissent by their subordinates"); *accord Connick* at 168-169 (Brennan, J., dissenting) ("extreme deference to the employer's judgment is not appropriate when public employees voice critical views concerning th operations of the agency for which they work. Although an employer's determination that an employee's statements have undermined essential working relationships must be carefully weighed in the *Pickering* balance, we must bear in mind that 'the threat of dismissal from public employment is . . . a potent means of inhibiting speech.'") (citation omitted).

B. Government employees who are writers and journalists are uniquely positioned to make significant contributions to the public debate about the functioning of government.

Journalists who are government employees are uniquely positioned to comment about government operations. Because they are trained observers and interpreters of complex information, journalists are arguably among the most informed and articulate voices of the citizenry. Jason P. Isralowitz, *The Reporter as Citizen: Newspaper Ethics and Constitutional Values*, 141 U. Pa. L. Rev. 221 (1991). This Court recognized that federal employees who wrote for publications in their spare time have made significant contributions to the marketplace of ideas, including "literary giants like Nathaniel Hawthorne and

Herman Melville, who were employed by the Customs Service; Walt Whitman, who worked for the Departments of Justice and Interior; and Bret Harte, an employee of the mint." *NTEU*, 115 S.Ct. at 978 ("Respondents have yet to make comparable contributions to American culture, but they share with these great artists important characteristics that are relevant to the issue we confront").

In *Eberhardt*, the court noted a "long tradition" of valuable sociological and muckraking publications that were written by employees or other insiders of the institutions exposed, including Henry Adams's novel *Democracy*, the academic novels of Mary McCarthy, Bernard Malamud, and C.P. Snow, Jay McInerney's fictional expose of the *New Yorker* magazine, where he had been employed, and novels by Louis Auchincloss, Scott Turow, and others about law firms, law schools and prosecutors' offices. *Id.*, 17 F.3d at 1026 (finding that a state attorney's First Amendment rights were violated when he was terminated for writing a novel involving fictitious prosecutors and other persons in the criminal justice system); *see also Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1233 (7th Cir. 1993) (rejecting a privacy and libel challenge and noting the value of a historical book about the migration of African-Americans to the North).

IV. Government journalists are protected by the First Amendment and may not be censored.

In 1988, then-President Reagan signed a bill authorizing the General Accounting Office ("GAO") to investigate allegations of censorship by military commanders of *Stars and Stripes*, a Department of Defense ("DoD") newspaper that serves U.S. military personnel stationed in Europe and the Pacific that is staffed by both civilian and military journalists. *Congress Plans Inquiry on the Military Press*, N.Y. Times, Dec. 13, 1987, at A32. Five members of The Society of Professional Journalists were appointed to serve as an advisory panel to the

GAO.

Although *Stars and Stripes* is a government newspaper, its charter requires it to provide "a free flow of news and information, to operate "without censorship or news management," and to be "factual and objective[]." 22 CFR § 247.4 *et seq*. In addition to providing news like any newspaper protected by the First Amendment, *Stars and Stripes* is also charged with providing "company news" to military personnel:

> The newspaper improves morale by quelling rumours, and keeping members informed on DoD information that will affect their futures. It provides information and assistance to family members, which improve their spirits and thereby the effectiveness of their military service and/or civilian member. The newspaper encourages participation in various positive leisure-time activities to improve morale and deter alcohol abuse and other pursuits that impair their ability to perform.

22 CFR § 247.6(b)(1)(i)(C).

The GAO study found evidence of censorship at *Stars and Stripes*. For example, the report noted that the newspaper "ran a lower proportion of stories" that presented a negative image of DoD, and that addressed "politically sensitive topics" such as the Strategic Defense Initiative and the Iran-Contra Affair, than the wire services carried. The report concluded that the newspaper's dual missions -- to provide objective news and to serve as a company newspaper designed to bolster morale -- caused an inherent conflict. *See GAO Report to the Congress, Stars and Stripes, Inherent Conflicts Lead to Allegations of Military Censorship*, December 1988, GAO/NSIAD-89-60, at 5.

The report offered recommendations to address the

censorship problem, such as appointing a civilian editor who would serve for a fixed term, implementing an editorial policy emphasizing that subjects of interest to the readership be published, directing military officers to refrain from interfering or influencing news content, encouraging investigative reporting, and conducting content analyses on a periodic basis. A recent article in the *Wall Street Journal* indicates that the newspaper adopted these recommendations. Bruce G. Knecht, *The Pen is Mightier: U.S. Troops in Bosnia Swear By a Newspaper that Generals Swear at*, Wall Street J., Dec. 23, 1996, at A1 ("After years of sometimes serving as little more than a Pentagon house-organ, *Stars and Stripes* now produces hard-hitting reports on the very military complex that publishes and subsidizes it").

The case of *Stars and Stripes* is instructive because there, censorship was found to be unacceptable, even in the context of a government controlled newspaper designed in part to boost troop morale. The allegations of censorship led to an investigation and recommendations designed to eradicate censorship and improper news management. As with *Stars and Stripes*, the VOA is required to adhere to the same basic journalistic principles, methods, values and standards as other news organizations, as reflected in its charter:

> The long-range interests of the United States are served by communicating directly with the people of the world by radio. To be effective, the Voice of America . . . must win the attention and respect of listeners. These principles will therefore govern Voice of America (VOA) broadcasts: (1) VOA will serve as a consistently reliable and authoritative source of news. VOA news will be accurate, objective, and comprehensive. (2) VOA will represent America, not any single segment of American society, and will therefore present a balanced and comprehensive projection of significant

> American thought and institutions. (3) VOA will present the policies of the United States clearly and effectively and will also present responsible discussion and opinion on these policies.

VOA Charter, signed into law by President Gerald R. Ford, July 12, 1976; 22 U.S.C. § 1463; 22 CFR § 504.2(e)(1)(i)(A)-(C).

It is ironic that VOA, a source of news to citizens of countries with no free press and/or repressive regimes, where censorship and government distortion is rife, would promulgate a review policy that has the effect of hampering robust debate by those well-situated to raise concerns about its operation. The review policy is antithetical to this country's strong commitment to a free press and an open exchange of ideas.

CONCLUSION

The review policy at issue here is unacceptable because it censors potential speech based upon vague government assertions of harm. *NTEU*, 115 S. Ct. at 1017 n.21 (deferring to the Government's speculation about the pernicious effects of thousands of articles and speeches yet to be written or delivered would encroach unacceptably on the First Amendment's protections).

Moreover, the review policy is contrary to VOA's mission to broadcast unbiased information to countries lacking a free press.

> Since its establishment . . . [VOA] has aimed at what it calls the 'denied' areas of the world where governments restrict the free flow of information. From China and Cambodia to Eastern Europe, people secretly tuned in on the

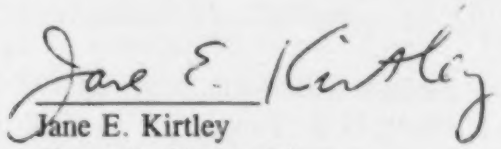
> often heavily jammed [VOA] . . . According to Richard Carlson, director of [VOA], "Our most important job is supplying what maestro Rostropovich once described as 'daily bread for people,' and that is what we are doing, intellectually feeding hungry people."

Barbara Gamarekin, *Voice of America Has Some Wondrous Plans*, N.Y. Times, Oct. 7, 1988, at A18. The review policy is similarly contrary to the agency's mandate to adhere to accepted journalistic practices.

According to Director Carlson, "[n]either the State Department nor U.S.I.A. nor the V.O.A. director has the right to interfere in the news report." *Id.* Similarly, the agency should not interfere with the nonclassified speech of its own employees. VOA exists to provide open debate and a free press to people in parts of the world where such freedoms are unknown. VOA should not engage in censorship.

For the foregoing reasons, we ask this Court to grant the petition for a writ of *certiorari*.

Respectfully submitted,



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